

RETHINKING THE LEGAL FICTION OF IRREVOCABLE CONSENT IN INDIA FROM THE LENS OF MARITAL RAPE

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Abstract

The term ‘consent’ is a voluntary and informed agreement of a person choice to participate in an act, relationship or any kind of decision. This paper rethinks the validity of such a legal presumptions in the ray of Constitutional values of dignity, equality, privacy and personal liberty. Free consent should be replaced by outdated legal presumptions to ensure better protection for an individual rights in Indian society as it impacts on women’s bodily autonomy and dignity. It argues, that consent is continuous and revocable choice within the matrimonial institution, this signifies the traditional challenges of marriage and contribute to discussion on gender justice and the need to align the Indian criminal laws.

Keywords- *Consent, Supreme Court of India, Indian Criminal law, Indian Penal Code, Bharatiya Nyaya Sanhita, Marital Rape, Matrimonial Institution.*

Introduction-

The law dissimulates that the consent is “implied” and boundless for every subsequent sexual act. This makes the legal concept of rape within marriage cerebral impossibility under that specific doctrine. There is a historical treatment under exception 2 to section 375 of IPC where, the Indian Penal Code is drafted in 1860,¹ this doctrine is from 18th century an English common law is specifically the legal treatise of Sir Matthew Hale.² Here absolute marital immunity exception 2 to section

¹ Indian Penal Code, No. 45 of 1860, § 375 Exception 2 (India).

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375 of IPC states the sexual intercourse by a man with his own wife not being under fifteen years of age, is not a rape. The property status has a historical provision treating a woman as they legally own her as a property of husband. Consent was treated as structural status based and set by marriage, rather than a wide awake. In 2017 the amendment in the landmark case independent thought v/s Union of India, the Supreme Court of India raised the institution to protect minor wives, as it ruled sexual intercourse with a wife under 18 years of age is rape.³

A transition to BNS 2023, where India overhauled its penal codes, the exception was perpetuated under section 63 of Bharatiya Nyaya Sanhita exception 2 continues to expressly shield husbands from rape charges involving an adult wife⁴. If we see from a modern legal, medical and psychology perspective consent cannot be permanent there is dynamic modern jurisprudence it establishes that consent must be unambiguous, voluntary and unbroken. Consent is clear to specific time, environment and nature of an individual act, it is true autotomy where a person holds on to the right to withdraw consent at any point before or during a sexual relations treating consent as permanent converts elective choice into a structural obligation.

While Indian prescribed criminal law to continue legal protection of marital immunity, constitutional jurisprudence strongly asserts that marriage does not quench sexual autonomy a constitutional contradiction in legal scholars argue with exception that directly violates article 14 right to equality and article 21 right to life, dignity and integrity of the Indian Constitution⁵. As the judicial precedents are taken by supreme court which repeatedly guaranteed in privacy and bodily autonomy in cases like **K.S Puttaswamy V/S Union of India 2017**, that a woman's body belongs

³ Independent Thought v. Union of India, (2017) 10 S.C.C. 800 (India).

⁴ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2 (India)

⁵ INDIA CONST. arts. 14, 21.

to her alone⁶. Currently, Indian law is highly fragmented the legislature protects the “Institution of Marriage” as it requires civil remedies rather than criminal prosecution vice versa, the rights advocates argue that marriage is a partnership of equals and should never shield a partner from violating an individual bodily agency. The Justice Verma Committee Report 2013,⁷ was formed immediately after the brutal case that took place in Delhi, Nirbhaya gang rape case 2012, (NCT)⁸ led by the former Chief Justice J.S Verma there was tension over the India with reviewing the Indian laws on sexual assault and recommending speedy trials with harsher punishments. There was abolishment of martial rape exception the committee strongly recommend it should be criminalized it was declared that marriage cannot be “irrevocable consent” to sex and the rapist regardless relationship with the victim. Rape is not a crime of passion or desire but is a violent weapon to control humiliation over women’s but unfortunately while, the government adopted many committees the suggestions and recommendation in the criminal law amendment 2013, was rejected to criminalize martial rape⁹. Later, the 272nd Law Commission Report 2017, was established under the title of statutory frameworks of tribunals in India, this report was carried by the law commission of India whose entire focus was on the mechanics of the legal system rather than criminal law¹⁰. This report tired to fix administrative judiciary but without any implementation the system institution suggested the law commission the struggle to provide timely relief to the survivors.

1) Evolution of martial rape in India –

⁶ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India).

⁷ Justice J.S. Verma, Justice Leila Seth & Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law (2013)*.

⁸ Mukesh v. State (NCT of Delhi), (2017) 6 S.C.C. 1 (India).

⁹ IBID of 6

¹⁰ *Law Comm'n of India, Report No. 272, Assessment of Statutory Frameworks of Tribunals in India (2017)*.

India has been evolved through Victorian era doctrine of coverture towards disputatious bodily autonomy with courts increasingly restricting the waiver, but not fully criminalizing it. Under section 375 of IPC historically shielded husbands where the landmark judgment holds that the violence against a minor wife under age of 18 years is rape¹¹, it indicates a slow shift to recognize that a wife is an independent legal person. Viewing in 1860s the colonial roots that framed the “doctrine of coverture”¹² means a wife’s body is permanently surrendered to her husband but under IPC where a wife’s identity was amalgamated with her husband’s exception 2 to section 375 exempted sexual intercourse by a man with his own wife earlier it was 15yrs later, it shifted to 18yrs from the definition of rape. In 1860, Thomas Babington Macaulay’s officially codded this doctrine by prioritizing the conjugal rights¹³ over a wife’s body as there are several factors influencing evolution such as patriarchal norms which are deeply embedded that belief a husband is entitled to his wife’s sexual services, remedy for survivors to seek protection under protection of women from domestic violence act, 2005¹⁴ it recognizes sexual abuse but unfortunately, does treat as criminal rape. There is a constitutional validity where the marital exclusion is been challenged under article 14, 15 and 21 of the Indian Constitution¹⁵. While the legal exemption remains the same on the paper for women over 18, judicial intervention illuminates sexual violence with marriage as a crime under often statutes but inevitable change.

¹¹ Supra of 2

¹² Under the doctrine of coverture, a married woman's legal identity was merged with that of her husband upon marriage. 1 William Blackstone, *Commentaries on the Laws of England* 442–45 (1765).

¹³ Flavia Agnes, Marriage, Divorce and Matrimonial Litigation in India, 1 *Fam. L. Rev.* 45 (2001).

¹⁴ Protection of Women from Domestic Violence Act, No. 43 of 2005, India Code (2005).

¹⁵ INDIA CONST. art. 14, art. 15, art 21.

The post-independence persistence and modern status in India retained under constitutional continuity article 372¹⁶ even though the statutory amendment cautiously raised the age approach for this exception the core for non- consensual sex within adult marriage remained as we can see the transition from IPC to BNS 2023, in a particular way 300 year old exception under exception 2 of section 63, reclaiming the law to maintain the legal conflict with modern constitutional protections. Despite, constitutional protection martial rape exception continues to exist in criminal law where still the Indian society is largely considering sexual relations within marriage as a private matter due to the legislators who fears that martial rape will sabotage the institution of marriage this results the legal system to continue to provide protection to husbands even when the sexual intercourse was forced. The women's right movement in the 1970s and 1980s had played an significant role to draw the attention of violence against married women although, the activists and scholars argued that forced sexual intercourse within marriage violates a women's body dignity and human rights while this period, other discussions like domestic violence, cruelty against wives, dowry death were more visible so, reforms mainly use to focus on physical violence and cruelty.

Presently, martial rape is still not fully criminalized in India, exceptions are limited to situations where the wife is under 18 years of age or the spouses are living separately under judicial separations as it issues highly debated among lawmakers, courts even the society. The supporters of criminalization believe that marriage cannot be used as a license for sexual violence during the opponents argue the misuse of law and impact on family structure struggle between traditional social values and modern constitutional principles that seek protection for women's rights.

2) Recasting of Consent in Indian Jurisprudence –

¹⁶ INDIA CONST. Art. 372.

There is structural shift in the Indian jurisprudence from where a women's marital or social status is imposing a command within her capacity to choose to a right based frameworks absolutely bodily autonomy. Historically, from passive submission to positive consent Indian court mostly merge but there is lack of defiance with implied consent. The modern jurisprudence rejects the 2013, criminal law amendment as it follows the 2012, Delhi gang rape case under section 357 of IPC was amended to introduce the statutory definition of 'consent' as it defines, an unambiguous voluntary agreement which is communicated through gestures, words or any form of verbal and non- verbal communication. Viewing the rejection submission the amendment adds an explanation stating that a woman who does not physically oppose an act of sexual violence cannot be presumed to have consented to it. The consent is under misconception of fact where, the scope is invalidated consent under section 90 of IPC ¹⁷and now under BNS under section 24¹⁸. There is false promise of marriage where the courts constantly modify consent in cases where sexual intercourse was obtained and there is impairing standards in cases if a man makes a promise of marriage with no intention of fulfilling it from the very first, the woman's consent is legally treated as non-existent because it was obtained under a misconception of fact.

Focusing on the autonomy and dignity under Article 21 of the Indian Constitution it reveals direct conflict between broad constitutional protections and obsolete statutory provision like the Martial rape exception. While criminal laws like section 63 of BNS maintain the structural presumption of a wife's submission on constitutional jurisprudence it radically expands the right to life of an individual

¹⁷ Indian Penal Code, No. 45 of 1860, § 90 (India).

¹⁸ Bharatiya Nyaya Sanhita § 24.

sovereignty over one's own body. Here, the Supreme Court of India is constantly heading the right to life under Article 21 of the Indian Constitution is not limited merely to animal existence. Looking deep into the case law **Maneka Gandhi v/s Union of India 1978**,¹⁹ the Apex Court has ruled that life shall include the right to live with human dignity where the state enforced laws must be just, fair and reasonable. Dignity within the marriage itself includes constitutional jurists who argue that the martial rape exception is mostly commonly in India and globally the jurisdictions refers legally that exempts husbands from being prosecuted for raping their wives. A woman's dignity is reduced and bound to submit to sexual dignity. The bodily integrity is the fundamental right to have a sheer dominance over one's own body without unapproved physical encroachment. The power to say "no" under Article 21 of the Indian Constitution where sexual freedom means an individual has the exclusive right to choose when, where and with whom to engage in sexual activity. Martial rape exception has legally denied a married woman legal power to revoke consent. The judicial and legislative divided between statutory law and Article 21 core principles which creates significant break within Indian courts. As, the High Court interpretations in the case *Aparna Bhattacharya v/s Union of India 2019*²⁰, judges have specifically noted that non- consensual martial sex violates the bodily integrity and dignity which is guaranteed under Article 21, even while split on whether the judiciary has the power to nullify the written exception. There is separation of powers argument which in contrast, the Union government's official bearing in affidavits depends on institutional stability, arguing that while a woman's consent is not annihilate by marriage, criminalizing it as rape is a policy decision that should be given to Parliament to prevent judicial overstepping a boundary. In criminal law valid consent must be having only one possibility which means it shall

¹⁹ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

²⁰ *Aparna Bhat v. State of Madhya Pradesh*, (2021) 3 S.C.C. 247 (India).

be voluntary agreement based on clarity of an act and its consequences. Here are three components that operate under Indian criminal jurisprudence it shall govern under section 90 of IPC and currently under section 29 of BNS. Firstly, if we talk about free consent it is legally not valid if it is withdrawn through pressure, fear or exploitation of power as there is statutory rule under section 90 of IPC and section 29 of BNS that the consent is invalidate if it is given under fear, there is criminal application incases if victim complies with an act because the accused is threatened physically, career failure or the future gets ruined, so the law treats this as submission and not as consent. Secondly, voluntary consent requires a person who shall be spontaneous to choose to participate were consent is void if the individual lacks the cognitive capacity is to exercise their choice it shall include the individual pain and trauma. As, the individual is heavily under the influence of alcohol plus drugs as they legally cannot offer the voluntary agreement since, their capacity to exercise free will is been at a risk. Even the law it set to boundaries at the age limit were a child under 12 years of age cannot give legally voluntary consent for general offences within the limit up to increase in 18 years for sexual offences under POCOS act²¹. Lastly, informed consent is the person who will be aware about the outcomes of the act as the consent is been obtained under a misconception of facts which is wholly invalid if the accused has been knowing or incases if he had a reason to believe, this mostly appears in false promise marriages. In case if, the accused is been caused of an action with someone into a sexual relationship by lying about their identity, intention of marrying, marital status the consent is legally void as it was based on absence of deception. Indian courts often highlight consent v/s coercion within marriage is where every consent involves submission but not every submission is involved consent. When a person gives up due to trauma, anxiety,

²¹ Protection of Children from Sexual Offences Act, No. 32 of 2012, INDIA CODE (2012).

exhaustion and psychological paralysis has submitted but unfortunately, they have not legally consented.²²

Criminal law viewing the consent must be an ongoing state of mind which can be cancelled at any point of time, it is never fixed or permanent. Consent means that an initial yes does not give the permanent right to an accused to complete as legally consent is not a one-time transaction. Indian courts are highly, ruling in non-marital contexts where long term relationship cannot be used to conclude, permanent consent. Communication of revocation from the standards of criminal liability that attach and later removes the consent so, there should be revocation communication in form of express no means no and implied acts on the situation of affirmative standards in modern jurisprudence.

3) Legislative Framework-

Under criminal law, an enacted definition of rape excludes the non-consensual sexual acts within marriage. Regarding marital rape there is a transition exception from the older IPC to newly BNS is taking the modern legal framework which provides from protection limited to under age 18, The legal consent collapse as the wife is minor. So, the exception 2 to section 63 of the BNS, applies if the wife is not under 18 years of age. There is an absolute barrier if a man has non-consensual sexual relationship with his wife who is under 18 years, he will be prosecuted for rape under BNS and make it worse penetrative as the sexual assault under the POCSO act, as we see the law withdraws protection from the husband even if the wife is an adult has only one specific condition that is “Judicial Separation”. There are challenges taking place under the exception section 63 of BNS which remains

²² MICHELLE J. ANDERSON, *NEGOTIATING SEXUAL CONSENT* 45–50 (2018).

highly, petition before Supreme Court of India as it creates the age based or the marital status is based on barrier which is fundamentally unconstitutional.

The Constitution of India defining the “violation” under Article 14, 15 and 21 by combining them together they are the ‘Golden Triangle’ in Indian Constitution as the law jointly say’s the need of equality, non- discrimination and liberty are essential. Article 14 shall guarantee equality before law as well as equal protection of the laws, there is an intelligible difference which law creates a division of married and unmarried women. At times there is no rational nexus between a women’s marital status and to maintain social order from preventing future wrongdoing as penalties can be achieved through deterrence, retribution, incapacitation, rehabilitation and restoration. In *Shayara Bano v/s Union of India* 2017²³, the triple talaq case where law is said to be unconstitutional as marriage can’t dwindle the physical and psychological trauma of non- consensual sex, treating a wife as permanent sexual property without any consent is arbitrariness. Under, Article 15 (1) strictly prohibits the state from discriminating against the citizens on grounds of sex, caste, race, religion and birth place. Here, male offenders are protected under exception of marital rape while they deny for female victims this gender discrimination and stereotypes, are overboard in case, *Kulsum Nisha v/s State of UP* 2026²⁴, as there is reaffirmation by Supreme Court of India, the constitutional interpretation on patriarchal presumptions that a woman’s identity ties upon the matrimonial home. Presuming as she enters into this marriage institution, she is permanently in a sexual agency upon a marriage is highly, constitutionally invalid. Looking towards, Article 21 of the Indian Constitution that guarantees the right to life and personal liberty itself it includes, complete authority over one’s own body. Affirming the

²³ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1 (India).

²⁴ *Kulsum Nisha*, 2026 INSC 617.

reproductive and sexual choices includes when, how and with whom to engage in sexual activity where a women's dignity should be paramount.

For, decades Indian personal laws were looked into marriage as religious rituals, symbolic pledges or socio status to replace the individual. The evolution of Indian family and laws are defined deeply into the marriage system that the Indian family law primarily prioritizes the matrimonial sector. However, the major judicial shifts began to shut down as the individual privacy, dignity, bodily integrity is ahead of this institution by framing the idea completely dominated individual rights to wedded bliss. The “restitution of conjugal rights” (RCR) under section 9 of the Hindu Marriage Act, 1955²⁵ there is a similar provision in personal law where RCR is been allowed the spouse to petition the court to constrain the other partner and return to the matrimonial home by this treatment a spouse physical body as a matrimonial asset. The willful and refusal of sexual intercourse without a reasonable cause consists of mental cruelty on such grounds valid separation is institutional framing to transform sex from an act of mutual consent into binding matrimonial duty. Here, is a landmark judgment *Saroj Rani v/s Sudarshan Kumar* 1984²⁶, which previously, upheld RCR by stating privacy inside a marriage was different altogether a concept.

A Feminist theory perspective, is designed to maintain patriarchy to reinforce, the society over male and female ownership of bodies. This theory deconstructs the law by bringing the revelation of how patriarchal power is been unique in this legal system. The liberal feminist legal theory focuses on the equality, individuality and their right. It argues, when the marital rape exception is creates the inequality, hierarchical system of citizenship so, when an unmarried woman is been possessed

²⁵Hindu Marriage Act, 1955, No. 25 of 1955, § 9 (India).

²⁶ *Saroj Rani v. Sudarshan Kumar Chadha*, A.I.R. 1984 S.C. 1562 (India).

of full sovereign right over her own body then why married woman should be dismantled of this legal protection.

The spousal exception that guarantees every citizen of marital status enjoys identical protection against bodily violations even the state does not treat a wife as independent as others woman's but as an exception to the law. There is a radical feminist legal theory which is originated by scholars such as, Catharine Mackinnon²⁷ it says that law is not neutral as there is more male power and dominances by this view the gender is not as a biological difference but as the system, society of dominant nature it been classed. The marital rape exception is the foremost ultimate expression of law as male sexual dominance is legalized a husband's access to a woman's body is transforming to be forced sex from a violent crime within marriage institution. States provides husbands with social, economic, legal power so concept like wife consent becomes a compulsion mask not as choice. Earlier, intersectionality was introduced by Kimberle Crenshaw who adapted the India Dalit and post-colonial feminist theory²⁸, the state often used to argue that married women need not need criminal laws as there were civil remedies such as, Protection of Women from Domestic Violence Act, 2005. However, marginalized low income, Dalit women in India use to file civil cases, hire lawyer and seek divorce at that period leaving matrimonial home was leading to violence from marital communities with deny to criminal law, there is trap of vulnerabilities of women in an abusive situation as there is lack of socio-economic mobility against them, an unprotected matrimonial home. Feminist legal theory is exposing the double standard of state as

²⁷ Catharine A. MacKinnon, *Women's Lives, Men's Laws* 245–67 (Harvard Univ. Press 2005).

²⁸ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139 (1989).

it simply chooses to protect the privacy of the dominant abuser over the safety of the victim. Following are some judicial precedents-

A) **Joseph Shine v/s Union of India 2018**²⁹- In this Supreme Court of India decriminalized adultery in India as the court is unanimously unenforceable the 158 years old section 497 of IPC is treated adultery as a crime was unconstitutional, deep patriarchal and discriminatory against women. Adultery is no longer a criminal offence but still remains valid reason for divorce under civil family law. Later, clarification in the year 2023 where the Supreme Court of India noted the military personnel can still face disciplinary action for adultery under specific military laws due to operational discipline requirements.

B) **RIT (Rural Information Technology) 2022**³⁰- This case was challenging the marital rape exception² to section 375 of the IPC which shields husbands from prosecution for non-consensual sex within marriage because, the two judges completely disagreed the legal status of marital rape in India remains unchanged the matter was referred to Supreme Court of India for a final decision. There were two different opposing judicial point views to shape this decision. Currently, the case went for deliberation before a larger bench to resolve the constitutionality of the marital rape exception under the Indian criminal law.

4) Social-Legal Realities and Legal Fiction-

²⁹ Joseph Shine v. Union of India, (2019) 3 S.C.C. 39 (India).

³⁰ *RIT Found. v. Union of India*, 2022 SCC OnLine Del 1404 (Delhi High Court, May 11, 2022).

In India marital consent creates disconnect between antiquated laws and brutally realities lived and still living for a woman but law presumes marriage is a rapport of automatic consent, the socio-legal reality is a system that sideline married woman for her bodily dignity. There are complexities in our ecosystem, cultural, institutional factors, economic which are deeply rooted in patriarchy as it comes from a traditional Indian martial concept like Pati Parmeshwar as in the women needs to see the husbands as a deity. Social stigma and shaming a woman for reporting sexual abuse by her husband is been seen as immersed societal backlashes, there is economic dependences has vast number of women in India there is lack financial independence without independences the income, property ownership or social safety net to leave an abusive husband means facing deprivation and homeless. There is massive under reporting due to economic and cultural because marital rape is so under reported crime in India it's data from successive National Family Health Surveys (NFHS)³¹ is consistent and it shows that the domestic and sexual violence within marriage is widely spread as the survivors know that reporting the abuse mostly leads to safety issues, choosing this instead of carrying the trauma to keep their children secure or avoid absolute social life.

Institutional failures due to police, judiciary and the marital system leads to police hostility, who often refuses to register the complaint rather than enforcing justice, it's the most common issue to label sexual violence as "private family disputes" or petty domestic quarrels that should be resolved within themselves. The compromising culture in family courts, community elders where women are been pressurized to return with the abuser husband for societal good will and blackmailing

³¹ Ministry of Health & Family Welfare (India), *National Family Health Survey (NFHS-5) 2019–21: India Report* 578–82 (2021).

through children's future. Cases, where a stranger or her partner forces for sex until and unless she is unmarried, it is treated as heinous crime the moment she is married woman the law stops recognizing her consent within the bedroom.

Conclusion-

The current, legal landscape requires to achieve true gender justice in India acquiring, disassembling the legal fiction of irrevocable consent while balancing the overlap between domestic violence, intimate partner violence (IPV)³² and marital rape. Currently, marital sex is legally been suppressed into civil law remedies such as, Protection of Women from Domestic Act or general criminal provisions example under section 498A cruelty³³. Combing sexual assault under one violence is highly diluting cruelty the severity of the crime, in cases slapping a spouse and raping a spouse they both are two different fundamental violations. The balance of gender justice needs to specifically categorize criminal with law must take into consideration that domestic violence for physical and emotional abuse, IPV for relationship violence of bodily autonomy. Balancing matrimonial protections with rights and misuse of matrimonial laws in bitter divorces, marital rape prosecutions must be clear with procedural standards under Bharatiya Sakshya Adhiniyam (BSA)³⁴. Ensuring the immediate deployment of the Protection of Women from Domestic Violence Act, to secure residence orders, maintenance, child custody so that a woman can report spousal rape is not being impoverished or homeless due to economic dependence. The in process constitutional delays before Supreme Court of India rises tension between legal constraint and dignity, the solution cannot rely on compromising that leaves a wife as property servant. Criminalizing marital rape

³² Jacquelyn C. Campbell, *Empowering Survivors of Abuse: Health Care for Battered Women and Their Children* 15–18 (2d ed. 2001).

³³ Indian Penal Code, No. 45 of 1860, § 498A (India).

³⁴ Bharatiya Sakshya Adhiniyam, No. 47 of 2023, INDIA CODE (2023).

will not collapse the marriage institutional structure rather it will establish modern right based stability where the intimacy should be permanently rooted in “mutual consent” and it should recognize that marriage is a partnership of equals not of transaction of ownership.